No. 06-1093

IN THE

Supreme Court of the United States

CITY OF ABERDEEN, SOUTH DAKOTA
Petitioner,

v.

ROB SENGER, MIKE ELIASON, JEFF FIEERLICK, MARIO GOURDE, AUSTIN HEARNEN, ROB JOHNSON, BROOKS KLEEMAN, TIM A. MEDENWALD AND KEITH A. SHARISKY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court review the Eighth Circuit's decision interpreting the Fair Labor Standards Act and the Department of Labor's longstanding regulation to require payment of overtime to a fire fighter, who is scheduled to work overtime but has a colleague substitute for him/her under Section 207(p)(3), when there is no conflict with this Court's precedent and no split among the U.S. Courts of Appeals on this issue?

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INTRODUCTION

The Respondent fire fighters have all been scheduled to work overtime hours but have had co-workers substitute for parts of their shifts. Their employer, the Petitioner City of Aberdeen, refused to pay the Respondent fire fighters overtime wages for the hours worked by the substitute. In doing so, the City ignored the plain language of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201 *et seq.*, and the Department of Labor's 20-year-old regulation, 29 C.F.R. § 553.31, that requires payment of overtime wages to the substituted-for employee. The City argues that the regulation is contrary to the statute and maintains, without citing *any* caselaw interpreting the trading time portion of the FLSA, that the Eighth Circuit erred in relying on this regulation.

Despite the City's assertions, there simply is no conflicting authority from this Court, or any other, regarding trading time. The cases cited by the City address other issues such as portal-to-portal time, meal periods, and annual leave, none of which have any bearing on the special statutory framework of fire fighters trading time under sections 207(p)(3) and 207(k). Notably, this Court's decisions cited by the City, *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U.S. 590 (1944), *Armour & Co. v. Wantock*, 323 U.S. 126 (1944), and *Steiner v. Mitchell*, 350 U.S. 247 (1956), do not even remotely touch on fire fighters' substitution of shifts. Since the Eighth Circuit's decision does not conflict with existing law, this Court's review is unnecessary.

Moreover, the Eighth Circuit properly held that the language of the FLSA did not reveal any intent to deny the Respondent fire fighters overtime wages. The Eighth Circuit examined the statute and found that the general rule regarding overtime wages in section 207(a) was inapplicable to situations in which an employer had willingly applied the trading time framework in section 207(p)(3). Reading section 207(p)(3) with section 207(k), which allows employers to

calculate overtime for fire fighters differently in keeping with their unique schedules, the Eighth Circuit found that Congress intended 207(p)(3) to ensure that both employees who trade time are "credited" as if s/he had worked his/her normal shift.

Significantly, the Eighth Circuit's decision validates the trading time practice of public employers under 207(p)(3) for at least the last 20 years since the provision was enacted, and a practice which Congress recognized as applicable to fire fighters as early as 1974. Employers are protected, not harmed, by the Eighth Circuit's holding that the employer need only pay the overtime wages that it intended to pay for the overtime hours it scheduled. Most employers' recognition of this may partially explain the lack of caselaw available for the Petitioner to cite in favor of a position that could be considered an outlier among most similarly situated employers who are accustomed to complying with the FLSA and section 207(p)(3). Thus, the Eighth Circuit's decision is not of such substantial importance as to warrant review by this Court.

STATEMENT OF THE CASE

Factual Background

While working for the City of Aberdeen, the Respondent fire fighters were scheduled to work hours in excess of the hourly limits prescribed in section 207(k). The parties agree that if each fire fighter had worked all of the scheduled hours in his/her shifts during the work periods at issue, s/he would have been entitled to overtime wages for the hours in excess of the statutory maximum. However, pursuant to the City's stand-in or trading time policy, the Respondent fire fighters (the "scheduled" or "substituted for" employees) had colleagues substitute for them for shifts during the work periods at issue.

Under the City's stand-in policy, authorized by section 207(p)(3), the stand-in employees received absolutely *no* compensation from the City for their stand-in work.[1] Instead, the City paid the scheduled employee only regular wages for the stand-in employees' work. The City maintained that section 207(p)(3) allows it to deny both employees overtime wages for the overtime hours the substitutes work. It refused to apply the Department of Labor's longstanding regulation requiring that each fire fighter must be compensated as if "he or she worked his or her normal schedule." 29 C.F.R. § 553.31(a). Thus, the City received the benefit of overtime work without paying overtime wages to *any* fire fighter.

Procedural History

On July 6, 2004, the Respondent fire fighters filed their complaint against the City of Aberdeen alleging violations of the FLSA based on the City's failure to pay overtime wages to either the substituted-for or stand-in employees and the City's refusal to abide by the Department of Labor's 20-year-old regulation regarding substitution of time. The parties agreed to a joint stipulation of facts, and then filed cross motions for summary judgment. On September 16, 2005, the U.S. District Court for the District of South Dakota denied the fire fighters' motion for partial summary judgment on liability and granted the City's motion for summary judgment.

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[1] Contrary to the Petitioner's assertions, the fire fighters do *not* concede "that the substitutes are not entitled to overtime wages for traded hours they worked." Pet. 4. The substitutes are not entitled to overtime wages for the traded hours they worked *only if* the City complies with section 207(p)(3) by paying the substituted-for employee overtime wages for the traded time. If the City chooses not to comply with the exception contained in section 207(p)(3) by paying the substituted-for employee overtime wages, then section 207(a) applies and the City must pay the stand-in employee overtime wages for any hours that exceed the statutory maximum in his/her schedule.

The U.S. Court for Appeals for the Eighth Circuit reversed the district court's decision, holding that Section 207(p)(3) requires public employers (who elect to allow their employees to substitute shifts) to pay wages, including overtime wages, to each employee "as if he or she had worked his or her normal schedule." Pet. A6 (quoting H.R. Rep. No. 99-331, at 25 (1985); S. Rep. No. 99-150, at 13 (1985)). *See also* 29 C.F.R. § 553.31(a). The Eighth Circuit held that the plain language of the relevant provisions of the FLSA that pertain to fire fighters "does not reveal a Congressional intent to deny an employee overtime wages when another worker voluntarily substitutes for him or her with the employer's permission." Pet. A5.

The City's petition for writ of certiorari followed.

REASONS FOR DENYING THE WRIT

I. THE EIGHTH CIRCUIT PROPERLY INTERPRETED SECTION 207(P)(3) OF THE FLSA.

Given the lack of conflicting authority regarding the interpretation of section 207(p)(3), this Court should deny the writ as the Eighth Circuit properly considered the language of the FLSA, the legislative history, and the Department of Labor's regulations.

A. There is No Conflicting Authority Regarding Whether a Substituted-For Employee is Entitled to Overtime Compensation Under Section 207(p)(3).

The Petitioner cites no decisions from any court, at any level, besides the initial district court decision in this matter, that conflict with the Eighth Circuit's decision interpreting section 207(p)(3) of the FLSA. Instead, the Petitioner attempts to create a conflict where none exists, arguing that

decisions regarding other provisions of the FLSA contradict the Eighth Circuit's interpretation of 207(p)(3).

Not only does the Petitioner fail to cite a single case evidencing a conflict between the circuits, it also fails to cite *any* case interpreting section 207(p)(3). Instead, it distracts the Court with cases pertaining to payment of overtime wages for portal-to-portal time, meal periods, and leave pay—many of which were decided from 1944 to 1967, well before section 207(p)(3) was enacted. Several of the cases on which the Petitioner relies deny employees overtime because of their failure to participate in "actual work or employment." However, even the Petitioner admits that these cases stem from interpretations of section 207(a) not 207(p)(3). Pet. 11. None address the trading time provision, the subject presented here.[2]

The decision below is in harmony with this Court's precedent and does not conflict with portal-to-portal decisions determining that employees must be compensated for "actual work or employment." *Tennessee Coal*, 321 U.S. at 597. This Court has not spoken to whether fire fighters' substitutions under sections 207(p)(3) and 207(a) constitute "actual work or employment." There is no reason why "actual work or employment" under the Court's precedent does not

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[2] The cases cited by the City simply are not on point. *See* Pet. 14-16. *See also Joseph G. Moretti Inc. v. Boogers*, 376 F.2d 27 (5th Cir. 1967) (holding that employees can be required to work on Saturdays under a fluctuating work week and that an employee cannot be compensated for meal periods and portal time); *Featsent v. City of Youngstown*, 70 F.3d 900 (6th Cir. 1995) (clarifying that night differentials, hazardous duty pay, and education bonuses may not be excluded from the regular rate of pay but the absence of medical claims and unused sick leave bonuses may be excluded); *Lanehart v. Horner*, 818 F.2d 1574 (Fed. Cir. 1987) (interpreting Title 5's "leave with pay" statutes' application to federal fire fighters); *Local 889, AFSCME v. Louisiana*, 145 F.3d 280 (5th Cir. 1998) (holding that correctional officers were not entitled to overtime when they did not work over the maximum hours threshold).

include what Congress has decided to define as actual work or employment under 207(p)(3), in the shift-trading context, to include paying fire fighters for time "actually worked" by another employee.

Moreover, to the extent that *Tennessee Coal* is applicable, it reinforces the appellate court's decision requiring the employer to pay overtime wages for overtime work scheduled and performed. Indeed, this Court stated:

> We are not guided by any precise statutory definition of work or employment. . . . But these provisions, like other portions of the Fair Labor Standards Act, are remedial and humanitarian in purpose. We are not here dealing with mere chattels or articles of trade but with the rights of those who toil, of those who sacrifice a full measure of their freedom and talents to the use and profit of others. Those are the rights that Congress has specially legislated to protect. Such a statute must not be interpreted or applied in a narrow, grudging manner.

Id. In this regard, the Eighth Circuit's decision follows *Tennessee Coal* rather than conflicts with it. In keeping with the humanitarian purpose of the FLSA, while also protecting employers, the Eighth Circuit interpreted sections 207(p)(3) and 207(k) to require an employer to pay overtime wages for hours actually worked by the substitute, but limited the overtime wages to the hours that the substituted-for employee was originally scheduled by the employer.

As no conflicting authority exists, the appellate court's decision does not require this Court's review.

B. The Eighth Circuit Properly Considered the Plain Language of the FLSA and the Legislative History Regarding Overtime Compensation for the Substituted-For Employee as Well as the Department of Labor's 20-Year-Old Regulation.

In interpreting section 207(p)(3), the Eighth Circuit followed the general rule that when construing a statute a court must first examine the language of the statute to determine whether it "clearly demonstrate(s) what Congress intended." Pet. A3-A4. If the intent from the statute is clear, the inquiry ends. *Id.* (citing *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 843 (1984)).

Section 207(a) sets forth the general rule for overtime compensation under the FLSA by limiting the hours employers may schedule employees to work within a work period to 40 hours before overtime wages are required:

> *Except as otherwise provided in this section*, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

29 U.S.C. § 207(a)(1) (emphasis added).

Sections 207(b), (f), (g), and (i)-(o) of the FLSA set forth numerous exceptions to the general overtime rule provided in Section 207(a). Section 207(k), added by the 1974 FLSA Amendments, establishes a partial exception for public employers of fire protection or law enforcement employees from the Act's general overtime requirements based on the public's need to have safety personnel work long shifts.

Under section 207(k), an employer can avoid violating section 207(a) by establishing a work period of seven to 28 consecutive days and paying overtime for hours that exceed at the outer limit 212 hours in a 28-day period. The alternative maximum hour threshold allowed under the Section 207(k) exception provides public employers the benefit of scheduling fire fighters long shifts (often 24-hour shifts) to provide for public safety without incurring significant overtime liability in the standard 40-hour work week.

In yet another exception to section 207(a), the 1985 FLSA Amendments in section 207(p)(3) recognized a longstanding practice of fire fighters—the practice of substituting for one another during scheduled shifts, sometimes called "trading time." The text of section 207(p)(3) sets forth requirements for the substitution practice underscoring that the substitution be allowed only at the approval of the employer. The plain language of section 207(p)(3) describes the employer's overtime obligations to the stand-in employee (notably none) but does not describe the employer's obligations to the scheduled or substituted-for employee. Because the statute is silent with regard to the calculation of overtime wages for the substituted-for employee, the Eighth Circuit appropriately turned to the legislative history and the Department of Labor's regulation implementing section 207(p)(3).

The Petitioner's argument that section 207(a) prohibits overtime payment to the substituted-for employee cannot be supported by the statute's framework. Following canons of statutory interpretation, the Eighth Circuit examined the language of the FLSA and found no support for the Petitioner's argument that section 207(a) required an employee to be "engaged" in commerce to receive overtime under section 207(p)(3). The court held that the term "engaged in commerce" was an "applicational threshold," and "[t]he word 'engaged' therefore relates not to whether the

employee was actively working, but whether the employee's or enterprise's work was of a certain kind." Pet. A4.

The Eighth Circuit also reasoned that the City's argument that fire fighters must be "engaged" in work to receive overtime wages was further invalidated because the Petitioner willingly adopted the alternative overtime scheme in section 207(k).[3] The Eighth Circuit examined the relationship between section 207(a) and section 207(k) and found that section 207(k), in setting forth an alternative maximum hour scheme for fire fighters, articulated an alternative to section 207(a). The court held:

> We see no indication in § 207(k) that all of those hours [the hours used to calculated overtime wages] must be worked by the employee him- or herself. We therefore conclude that the FLSA's plain language does not reveal a Congressional intent to deny an employee overtime wages when another worker voluntarily substitutes for him or her with the employer's permission.

Pet. A5.

Once the Eighth Circuit determined that the statute was silent with regard to payment of overtime wages to the substituted-for employee, it properly turned to the legislative history of the FLSA. The legislative history makes clear that Congress intended that the computation of overtime for both employees must not be affected by the substitution of time under section 207(p)(3). Thus, the scheduled employee must be paid for the overtime worked by the substitute.

Both the Senate and House Reports emphasized that public employers have allowed employees to substitute time

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[3] Contrary to Petitioner's assertion, the Eighth Circuit did not hold that section 207(a) is inapplicable to all fire fighters. Instead, the court questioned the applicability of section 207(a) when an employer has chosen to comply with 207(k) instead.

"without affecting the computation of overtime for *either* employee." H.R. Rep. No. 99-331, at 25 (1985) (emphasis added); *See also* S. Rep. No. 99-159, at 13 (1985) *reprinted in* 1985 U.S.C.C.A.N. 651, 661. The Congressional Reports explained, in nearly identical language: "If two employees trade hours pursuant to this subsection, each employee will be credited as if he or she had worked his or her normal work schedule." *Id.*

The Eighth Circuit properly understood that the House and Senate Reports express "a clear indication that the purpose of § 207(p)(3) was to fashion a way to allow voluntary substitutions without having overtime costs spiral out of control. By having the employer credit each employee for the shift to which s/he was scheduled, the subsection limits the amount that an employer will have to pay in overtime wages to no more than it would have paid absent the voluntary shift substitutions." Pet. A6.

Thus, the legislative history aided the Eighth Circuit in understanding that Section 207(p)(3) was intended to require payment of overtime wages to the scheduled employee. Moreover, the Eighth Circuit simultaneously considered the legislative history with the plain language of the Department of Labor's regulation interpreting the statute because the text of 29 C.F.R. § 553.31 is taken directly from the House and Senate Reports.

In general, when a statute is silent with respect to an issue, the reviewing court, in addition to examining legislative history, must respect the implementing agency's construction of the statute. *Chevron*, 467 U.S. at 843. In this case, because the language of the Department's regulation is identical to the language of the Congressional Reports regarding section 207(p)(3), the Eighth Circuit easily found that the regulation deserved respect. Noting that the regulation "used exactly the same language" as the House and Senate Reports, the Eighth Circuit held that 29 C.F.R. § 553.31

"is therefore fully consistent with the clearly expressed intent of Congress." Pet. A6.

Because the Eighth Circuit found that the agency's regulation reasonably reflected Congress' intent, the Eighth Circuit properly considered the Department's 20-year-old regulation, a regulation which *never* before had been challenged in the courts. The court's consideration of a longstanding regulation that mirrors the language of the House and Senate Reports does not provide any grounds for this Court's review.

C. The Eighth Circuit Properly Respected the Department of Labor's Interpretation of Its Regulation in Its *Amicus Curiae* Brief Supporting the Respondent Fire Fighters and in the Regulation Itself.

After deferring to the Department's reasonable regulation, the Eighth Circuit noted that the term "credited" in the regulation was unclear with regard to payment of overtime wages to the scheduled employee. *Id.* Consistent with this Court's holding in *Auer v. Robbins*, 519 U.S. 452 (1997), the Eighth Circuit then looked to the Department of Labor's interpretation of its regulation to determine whether it was "plainly erroneous."

Finding that the Department's interpretation was not plainly erroneous based on the text of the FLSA and the legislative history, the Eighth Circuit noted that the Department of Labor consistently interpreted the term "credited" to include "compensation." Pet. A6 (citing *Application of the Fair Labor Standards Act to Employees of State and Local Governments*, 52 Fed. Reg. 2012, 2018 (Jan 16, 1987)). Furthermore, the Department of Labor's *amicus* brief reiterated that the Secretary interprets the term "credited"—as used in its regulation (and in the legislative history)—to require the employer to treat the scheduled

employee as if s/he had worked his/her shift. Labor Br. at 23. The Eighth Circuit's reasonable reliance on the Department's interpretation of its own regulation, which has been in effect for over two decades, does not merit review by this Court.

D. The Eighth Circuit's Decision Preserves Congress's Intent to Protect Public Employers from Excess Overtime Liability.

The City acknowledges that Congress intended 207(p)(3) to encourage employers to continue the longstanding practice of trading shifts. The Eighth Circuit's decision preserves Congress' intent to allow trading time without public employers incurring significant excess overtime liability. H.R. Rep. No. 99-331, at 25 (1985); S. Rep.No. 99-159, at 13 (1985). Moreover, as the Eighth Circuit explained, the protections afforded the employer in the regulation ensure that employers face no additional burdens when they allow their employees to trade time:

> All the City has to do is pay the scheduled employee as if he or she had worked the scheduled shift; it need not keep any additional records. And the City need not monitor all shift exchanges, because any voluntary substitutions that take place will not cause the employer's actual overtime expenditures to vary from the expectations that it developed when it first scheduled the employee.

Pet. A7.

The City's argument that the Eighth Circuit's decision will encourage employees to abuse shift substitution is unfounded. First, if employers are concerned about abuse of shift substitution, they can simply disallow any substitutions. Section 207(p)(3) does not require shift substitution; it merely allows an employer to permit it. Abuse is also unlikely given that public employers and employees have engaged in shift substitution since before the passage of section 207(p)(3) in

1985. In fact, Congress acknowledged fire fighters' practice of trading time as early as the 1974 FLSA Amendments. *See* 120 Cong. Rec. S8760. If section 207(p)(3) and 29 C.F.R. § 553.31 varied substantially from the practice of public employers when they were enacted in 1985 and promulgated in 1987, litigation would have resulted soon after. Instead, there has been none. Consequently, the Eighth Circuit's decision is not of such substantial importance as to warrant this Court's review. The practice of public employers under 207(p)(3) for the last 20 years has been that "the employee scheduled to work receives credit (and compensation) as if he or she had worked." 52 Fed. Reg. at 2018. The Eighth Circuit's decision affirms this well-settled practice.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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